IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 382 OF 2007

Jari Mari Co-op. Hsg. Soc. Ltd.)
A Society formed under the M.S.C.)
Act, 1960 and having its registered)
office at Acharya Atre Marg, Worli)
Hill Road, Mumbai 400 018.) ..... Appellant.
(Original Defendant No.4)

Vs

1. Shamshad Begum Abdul)
Hamid Khan of Mumbai, Indian)
Inhabitant, Female, Adult,)
Occ: Business, having her address)
at Jari Mari Co-op. Hsg. Soc.)
Acharya Atre Marg, Worli Hill)
Road, Mumbai 400 018.)
)
2. Municipal Corporation of)
Greater Mumbai,)
A Statutory Body formed under the)
MMC Act, 1988, having registered)
office at Mahapalika Marg,)
Mumbai 400 001.)
)
3. State of Maharashtra)
)
4. Slum Rehabilitation Authority)
a Authority constituted under The)
Maharashtra Slum Areas)
(Improvement Clearance and)
Redevelopment) Act, 1971, having)
their office at 16th Floor, MHADA)
Building, Bandra, Mumbai.)
)

5. Shri Bhimrao Jadhav, Secretary)
Jari Mari Co-op. Hsg. Soc. Acharya)
Atre Marg, Worli Hill Road,)
Mumbai 400 018.)
)
6. Shri Sadnand Annaji Mahadik,)
Chairman, Jari Mari Co-op. Hsg.)
Soc., Acharya Atre Marg, Worli)
Hill Road, Mumbai 400 018.)
)
7. Haribans Singh, Proprietor,)
M/s. Super Constructions,)
Mangalmurthi, Opp. Highway)
View, Near Sanpada Rly. Station,)
Vashi, Navi Mumbai.) ....Respondents.
(Original Defendant Nos. 1 to 3
& 5 to 7)

AND

8. Abdul Bashir Hamid Khan)
of Mumbai, Indian Inhabitant,)
Adult, Occ Business, having his)
address at Jari Mari Co-op. Hsg.)
Soc., Acharya Atre Marg, Worli)
Hill Road, Mumbai 400 018.) .....Respondent
(Respondent in N/M No.1364/06)

Mr. Puniwalla i/b I. P. D'cruz for the appellant.

Mrs. A.N. Pathan for Respondent No.2.

Mr. Y.M. Nakhwa, APP for the State.

CORAM: V.M. KANADE, J.
DATE : 29th August, 2007

ORAL JUDGMENT:

1. Heard the learned Counsel appearing on behalf of the appellant, the learned Counsel appearing on behalf of Respondent No.2.

2. The appellant is challenging the order passed by the City Civil Court in Notice of Motion taken out by original defendants, seeking prosecution of the plaintiff and her constituted Power of Attorney under section 340 of the Code of Criminal Procedure. By the said order, City Civil Court was pleased to postpone the inquiry which is contemplated under section 340 of the Code of Criminal Procedure and has observed that the said inquiry would be held at the time of trial by the Civil Court.

3. The learned Counsel appearing on behalf of the appellant has submitted that the suit was filed by the plaintiff through her constituted Power of Attorney i.e. her own son and that the said Power of Attorney was false & fabricated and on the basis of this false and fabricated Power of Attorney, interim orders were obtained by the plaintiff in the Trial Court. He invited my attention to the Power of Attorney. He submitted that the stamp paper on which the Power of Attorney was executed was issued in favour of one Ms. Asha Karmarkar. He submitted that the Power of Attorney did not contain any clause permitting the constituted Power of Attorney to file a suit on behalf of the plaintiff. He submitted that, subsequently, after the suit was filed on the basis of aforesaid Power of Attorney, when

objection was raised regarding the authority of the son of the plaintiff to file suit on the basis of the said Power of Attorney, the name of Ms. Asha Karmarkar which was initially there on the original stamp paper on which the Power of Attorney was typed, was erased with white ink and the name of the plaintiff was superimposed on the said stamp paper. The appellant herein i.e original Defendant No.4 filed Notice of Motion in which Defendant No.4 had claimed the following reliefs.

> "a) That the L.C. No.2518 filed by the Plaintiff herein be dismissed with exemplatory costs;
>
> b) That the Plaintiff be directed to deposit the Original Power of Attorney dated 21st June, 2005, used to file the present Suit, in this Hon'ble Court and the same be impounded.
>
> c) That a preliminary inquiry be ordered into the offences committed by the Plaintiff - Shamshad Begum and her constituted attorney - the Respondent herein, and during the course of judicial proceeding and after recording the offences direct the Officer of this Hon'ble Court to make a Complaint to the concerned Magistrate for requisite

prosecution of the Plaintiff and the Respondent in accordance with the law and / or sanction prosecution and direct the Registrar or any other officer of the Court be approved to prosecute them;

d) That the Plaintiff and the Respondent namely the Power of Attorney holder be taken into custody to the Court of the concerned Judicial Magistrate and / or

e) That the hearing and final disposal of this Notice of Motion be expedited;

f) For costs of this Notice of Motion;

g) For such further and other reliefs as the nature and circumstances of the case may require."

4. Plaintiff filed her affidavit in reply. Similarly, her son who was the Power of Attorney holder also filed his affidavit in reply to the said Notice of Motion and further affidavit of one Omprakash was also filed.

5. The learned Counsel appearing on behalf of the appellant

invited my attention to the inherent contradictions in the said affidavits filed by the said parties. He submitted that on the one hand the plaintiff who was the mother of Abdul Bashir Hamid Khan, the Power of Attorney holder, had stated that she had no knowledge as to who had erased the name of Ms. Asha Karmarkar from the stamp paper and neither her son nor Mr. Omprakash was the author of the said change which was made on the said stamp paper. He invited my attention to the affidavit of Abdul Bashir Hamid Khan who has stated that he had erased the name of Ms. Asha Karmarkar from the stamp paper when he was informed that objection was raised regarding the said Power of Attorney and, thereafter, he had put the name of his mother. It is submitted that in view of this clear admission made by the Power of Attorney holder Abdul Bashir Hamid Khan, the Trial Court ought to have filed a complaint under section 340 of the Code of Criminal Procedure. He invited my attention to the impugned order and submitted that the Trial Court had proceeded on the assumption that, in the said inquiry, the Trial Court was going to pass the final order of conviction. He submitted that provisions of section 340 are very clear and it contemplated that inquiry should be held initially and, thereafter, if the Court is satisfied about genuineness of the complaint then the Trial Court itself should file a complaint under section 193 of the Indian Penal Code. In support of the said submission, he relied upon the judgment of the Apex Court in K. Karunakaran Vs. T.V. Eachara Warrier and anr. reported in **(1978) 1 SCC 18** and more particularly paragraphs 20, 21, and 30 of the said judgment.

6. In my view, it is not necessary to interfere with the order passed by the Trial Court at this stage. It is true that the order passed by the Trial Court is not very happily worded. However, the facts remains that the Trial Court has thought it fit to postpone the inquiry of the said proceedings which are initiated under section 340 at the stage of the trial.

7. In the present case, admitted position is that the Power of Attorney holder is a son of the Plaintiff. It is no doubt true that the Power of Attorney does not contain any clause authorizing her son to file a suit on behalf of the plaintiff. However, it is not disputed that the plaintiff had never denied that she had authorized her son to file the suit and in her affidavit she has categorically stated that if there is any technical lacuna in the said Power of Attorney, she was willing to correct it by filing proper Power of Attorney in favour of her son. The erasers which are made on the stamp paper also appear to have been made for the purpose of correcting the lacuna, probably without realizing the legal and other consequences arising out of the said act. In any case, the said question will have to be decided by the Trial Court when it holds its inquiry under section 340 of the Code of Criminal Procedure. It is a well settled position in law that the inquiry which is held under section 340 on a complaint which is lodged by one of the parties to the litigation has to be scrutinized with care and caution in order to ensure that on the basis of false and frivolous complaint action is not taken against the litigant who has a right to pursue the litigation. Therefore, section 340 confers a discretion on the Trial Court to decide whether complaint should be

filed after the inquiry is held under section 340. In the present case, the learned Judge of the City Civil Court has thought it fit to postpone the inquiry under section 340.

8. Under the circumstances, therefore, there is no reason to interfere with the order passed by the Trial Court. Appeal is accordingly dismissed.

(V.M. KANADE, J.)